Kondisi Utama Sdn Bhd v Baltic Agencies Pte Ltd and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02(f)-89–12 OF 2015(T) AND 02(f)-90–12 OF 2015(T)
ZULKEFLI PCA, HASAN LAH, AZAHAR MOHAMED, ZAHARAH IBRAHIM AND PRASAD ABRAHAM FCJJ
16 AUGUST 2018

Civil Procedure — Pleadings — Defects in pleadings — Whether in appropriate cases defects in pleadings could be made up for by the evidence given at trial if opposing party was not taken by surprise and especially where it had not objected to the evidence given

Contract — Formation — Whether there was a contract — Whether facts and circumstances of case showed that contracts came into existence between the parties — Whether there was breach of those contracts entitling the plaintiff to general damages

The dispute between the parties in the two appeals herein concerned a multi-million ringgit project involving sea dredging and reclamation and marine infrastructure development works ('the works') that was awarded by the Terengganu State Government to Eastern Pacific Industrial Corp Bhd ('EPIC'). EPIC, in turn, appointed Kondisi Utama Sdn Bhd ('Kondisi') to carry out the works. In its suit for breaches of contract against EPIC and Kondisi in the High Court, Baltic claimed that by virtue of two letters, Kondisi had subcontracted the works to Baltic. Alternatively, Baltic claimed that EPIC had awarded the contract for the works to a joint venture ('JV') between Baltic and Kondisi. Baltic claimed that pursuant to representations and inducements made by EPIC's Chief Executive Officer ('Ramli') and Kondisi's director ('Amarjeet'), and with their full knowledge and active participation, Baltic had procured a dredge and related vessels ('the KSE vessels') for the project from a foreign company ('KSE') but EPIC and Kondisi allegedly conspired to cause the procurement to fail so that they could thereafter deal directly with KSE to acquire the KSE vessels and exclude Baltic from the performance of the works. In their defences, EPIC and Kondisi denied that they had any contractual relationship with Baltic. Kondisi claimed its letters to Baltic were not to appoint it as its subcontractor but only to request it to source for a dredge named Sical Portofino but Baltic could not procure that vessel. Kondisi also denied that it had any joint venture with Baltic. Kondisi counterclaimed against Baltic for losses it allegedly suffered as a result of an injunction Baltic obtained to prevent it from proceeding with the works. Following a trial, the

High Court dismissed Baltic's claim and allowed Kondisi's counterclaim, holding, inter alia, that there was no contract between Baltic and either EPIC or Kondisi and neither did any JV exist; that the letters Baltic had relied upon to show the existence of a contract were merely letters of offer that envisaged the execution of a further agreement. The Court of Appeal ('COA'), however, allowed Baltic's appeal and ruled that the facts and circumstances of the case pointed to the existence of implied contracts between Baltic and Kondisi and between EPIC and the JV which were made partly by the letters written by EPIC and Kondisi, partly by the conduct of Ramli and Amarjeet and partly by performance on Baltic's part and that Baltic was, accordingly, entitled to general damages for the breaches of those contracts. Among the arguments raised by the appellants in their instant appeal against the COA's decision was that as Baltic had not pleaded the existence of any implied contracts, the COA should not have made a finding that they existed and decided the case on an unpleaded issue.

Held, dismissing the appeals:

(1) The evidence showed that a contract had come into existence between EPIC and an informal joint venture partnership between Kondisi and Baltic. That joint venture clearly existed and EPIC and Kondisi had clearly admitted to its existence by the actions taken by Ramli and Amarjeet. The evidence also showed that EPIC had breached that contract by offering Kondisi a contract for the works by its letter dated 16 October 2011 and Kondisi had breached its joint venture agreement with Baltic by accepting that offer on 17 October 2011 and subsequently choosing to utilise the KSE vessels procured by Baltic and keeping Baltic out of the works. The COA had made the correct decision in allowing Baltic's claim and ordering damages to be assessed (see paras 128–130).

(2) What Baltic lacked in pleading was more than made up for by the evidence before the High Court. Baltic's complaint was essentially that both EPIC and Kondisi had caused Baltic to believe that it was being engaged to perform the works and had caused Baltic to take steps to attempt to procure Sical Portofino, and, when that was unsuccessful, to obtain a replacement dredger and other vessels. When Baltic succeeded in obtaining the necessary vessels, EPIC and Kondisi sidelined Baltic and shut it out completely from the works. Neither EPIC nor Kondisi was under any misapprehension that that was the complaint against them. They were not taken by surprise and did not object to the evidence given by Baltic's witnesses. Evidence was led during the cross-examination of their own witnesses which supported Baltic's position. As was held by this court in *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, evidence adduced during the

hearing could in appropriate circumstances overcome defects in the pleadings as long as the other party was not taken by surprise, especially if the evidence was given without any objection by the other party (see paras 124–127).

[Bahasa Malaysia summary

Pertikaian antara pihak-pihak dalam dua rayuan berkaitan projek jutaan ringgit melibatkan kerja-kerja pengerukan laut dan penambakan dan pembangunan infrastruktur marin ('kerja tersebut') yang telah diawardkan oleh Kerajaan Negeri Terengganu to Eastern Pacific Industrial Corp Bhd ('EPIC'). EPIC, seterusnya, melantik Kondisi Utama Sdn Bhd ('Kondisi') untuk menjalankan kerja tersebut. Dalam guamannya untuk pelanggaran kontrak terhadap EPIC dan Kondisi di Mahkamah Tinggi, Baltic mendakwa bahawa menurut dua surat, Kondisi telah memberi subkontrak untuk kerja tersebut kepada Baltic. Secara alternatifnya, Baltic telah mendakwa bahawa EPIC telah mengawardkan kontrak untuk kerja tersebut kepada usahasama ('JV') antara Baltic dan Kondisi. Baltic mendakwa bahawa menurut representasi dan dorongan yang dibuat oleh Ketua Pegawai Eksekutif EPIC ('Ramli') dan pengarah Kondisi ('Amarjeet'), dan dengan pengetahuan penuh dan penglibatan aktif, Baltic telah memperoleh kapal-kapal pengorek dan yang berkaitan ('kapal KSE') untuk projek dari syarikat asing ('KSE') tetapi EPIC dan Kondisi dikatakan berkomplot untuk menyebabkan perolehan itu gagal supaya mereka selepas itu boleh berurusan secara langsung dengan KSE untuk memperoleh kapal KSE dan mengecualikan Baltic daripada melaksanakan kerja tersebut. Dalam pembelaan mereka, EPIC dan Kondisi menafikan bahawa mereka mempunyai apa-apa hubungan kontraktual dengan Baltic. Kondisi mendakwa surat-suratnya kepada Baltic adalah untuk tidak melantiknya sebagai subkontraktirnya tetapi hanya untuk memintanya memberi sumber bagi kapal pengorek bernama Sical Portofino tetapi Baltic tidak boleh memperoleh kapal tersebut. Kondisi juga menafikan ia mempunyai apa-apa usahasama dengan Baltic. Kondisi menuntut balas terhadap Baltic untuk kerugian yang dikatakan telah dialaminya akibat injunksi yang diperoleh Baltic untuk mengelaknya daripada meneruskan dengan kerja tersebut. Berikutan perbicaraan itu, Mahkamah Tinggi telah menolak tuntutan Baltic dan membenarkan tuntutan balas Konsidi, dengan memutuskan, antara lain, bahawa tiada kontrak antara Baltic dan EPIC atau Kondisi dan tiada JV yang wujud; bahawa surat-surat yang Baltic bergantung kepada untuk menunjukkan kewujudan kontrak hanyalah surat-surat tawaran yang menjangkakan pelaksanaan perjanjian selanjutnya. Walau bagaimanapun, Mahkamah Rayuan ('MR') membenarkan rayuan Baltic dan memutuskan bahawa fakta dan keadaan kes itu menunjukkan kewujudan kontrak tersirat antara Baltic dan Kondisi dan antara EPIC dan JV yang dibuat sebahagiannya oleh surat-surat yang ditulis oleh EPIC dan Kondisi, sebahagiannya oleh perlakuan Ramli dan Amarjeet dan sebahagiannya oleh pelaksanaan di bahagian Baltic dan bahawa Baltic, dengan itu, berhak untuk

mendapat ganti rugi am kerana pelanggaran kontrak tersebut. Antara hujah-hujah yang ditimbulkan oleh perayu dalam rayuan mereka ini terhadap keputusan MR adalah bahawa oleh kerana Baltic tidak mempli kewujudan apa-apa kontrak yang tersirat, MR tidak sepatutnya membuat dapatan bahawa ia wujud dan memutuskan kes itu adalah isu yang tidak dipli.

Diputuskan, menolak rayuan-rayuan:

(1) Keterangan menunjukkan bahawa kontrak perlu wujud antara EPIC dan perkongsian usahasama tidak rasmi antara Kondisi dan Baltic. Usahasama tersebut jelas wujud dan EPC dan Kondisi jelas mengakui kewujudannya melalui tindakan yang diambil oleh Ramli dan Amarjeet. Keterangan juga menunjukkan bahawa EPIC telah melanggar kontrak tersebut dengan menawarkan Kondisi suatu kontrak untuk kerja tersebut melalui suratnya bertarikh 16 Oktober 2011 dan Kondisi telah melanggar perjanjian usahasamanya dengan Baltic dengan menerima tawaran tersebut pada 17 Oktober 2011 dan seterusnya memilih untuk menggunakan kapal KSE yang diperoleh oleh Baltic dan mengecualikan Baltic daripada kerja tersebut. MR telah membuat keputusan yang betul kerana membenarkan tuntutan Baltic dan memerintahkan ganti rugi ditaksir (lihat perenggan 128–130).

(2) Apa yang tiada dalam pliding Baltic mencukupi dengan keterangan di hadapan Mahkamah Tinggi. Aduan Baltic adalah penting bahawa kedua-dua EPIC dan Kondisi telah menyebabkan Baltic untuk mempercayai yang ia telah dilantik untuk melaksanakan kerja tersebut dan menyebabkan Baltic mengambil langkah-langkah untuk cuba memperoleh SicalPortofino, dan, apabila itu tidak berjaya, untuk memperoleh pengganti untuk kapal pengorek dan kapal-kapal lain. Apabila Baltic Berjaya untuk memperoleh kapal-kapal yang diperlukan, EPIC dan Kondisi mengetepikan Baltic dan mengelakkannya daripada kerja tersebut. EPIC mahu pun Kondisi tidak tersalah faham bahawa ianya adalah suatu aduan terhadap mereka. Mereka tidak terkejut dan tidak membantah kepada keterangan yang diberikan oleh saksi-saksi Baltic. Keterangan dikemukakan semasa pemeriksaaan balas saksi-saksi mereka sendiri yang menyokogn kedudukan Baltic. Sepertimana diputuskan oleh mahkamah ini dalam kes *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773, keterangan yang dikemukakan semasa perbicaraan boleh dalam keadaan yang sesuai mengatasi kecacatan dalam pliding selagi pihak lain tidak terkejut, terutamanya jika keterangan telah diberikan tanpa apa-apa bantahan oleh pihak yang lain itu (lihat perenggan 124–127).]

Notes

For a case on whether there was a contract, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) para 5577.

For cases on defects in pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7371–7381.

Cases referred to

Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Sinar Wang Sdn Bhd v Ng Kee Seng [2005] 2 MLJ 42; [2004] 3 CLJ 679, CA (refd)

Superintendent Of Lands And Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78

Harpal Singh Grewal (Teh Boon Eng and Reny Rao with him) (Teh & Assoc) in Civil Appeal No 02(f)-89–12 of 2015(T) for the appellant.

Shahul Hameed Amirudin (Norliza Rasool Khan, Bryan Teo Wee Xin and Farah Shuhadah Razali with him) (Zul Rafique & Partners) in Civil Appeal No 02(f)-90–12 of 2015(T) for the appellant.

Muhammad Shafee bin Abdullah (Jasbeer Singh and Revathi Kamalanathan with him) (Jasbeer Nur & Lee) in Civil Appeal No 02(f)-89–12 of 2015(T) for the respondent.

Muhammad Shafee bin Abdullah (Jasbeer Singh and Revathi Kamalanathan with him) (Jasbeer Nur & Lee) in Civil Appeal No 02(f)-90–12 of 2015(T) for the first respondent.

Harpal Singh Grewal (Teh Boon Eng and Reny Rao with him) (Teh & Assoc) in Civil Appeal No 02(f)-90–12 of 2015(T) for the second respondent.

Zaharah Ibrahim FCJ (delivering judgment of the court):

INTRODUCTION

[1] There are two related appeals before us, Appeal No 02(f)-89–12 of 2015(T) ('Appeal No 89') and Appeal No 02(f)-90–12 of 2015(T) ('Appeal No 90').

[2] The appeals are appeals by Kondisi Utama Sdn Bhd ('Kondisi'), who was the second defendant in the High Court, and Eastern Pacific Industrial Corp Bhd ('EPIC'), who was the first defendant in the High Court, respectively,

against the decision of the Court of Appeal allowing the appeals by Baltic Agencies Pte Ltd ('Baltic'), who was the plaintiff in the High Court, against the decisions of the High Court which dismissed Baltic's claim against EPIC and Kondisi but allowed the counterclaim by EPIC against Baltic.

[3] To avoid confusion, each of the parties will be referred to in this judgment by its name as abbreviated above.

BACKGROUND FACTS

[4] The dispute which led to these appeals before us relates to a project involving dredging, reclamation and marine infrastructure development works at Pulau Kuching, Kemaman Terengganu ('the works').

[5] Baltic claimed to have been awarded a subcontract for the works by Kondisi or alternatively claimed that EPIC had awarded a contract for the works to 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' ('JV') a joint venture consisting of Kondisi and itself. However, Baltic claimed that EPIC and Kondisi had breached those contracts.

[6] Baltic then brought this action against EPIC and Kondisi.

AT THE HIGH COURT

Baltic's claims

[7] Baltic's pleaded case was that it was appointed by Kondisi as the latter's subcontractor as shown in the letters dated 10 May 2011 and 2 August 2011. It had, pursuant to that appointment, expended money and time and effort towards the acquisition of dredgers for the works. The work done by Baltic was within the knowledge of EPIC's Chief Executive Officer and representative, Ramli Shahul Hameed ('Ramli'), and Kondisi's director and representative, Amarjeet Singh ('Amarjeet').

[8] Baltic claimed that as a result of the representation and inducement of EPIC and Kondisi it had entered into an agreement dated 7 October 2011 with AA Dredgers Pte Ltd ('AA Dredgers') for the supply of 3 dredgers of different sizes. This was well within the knowledge of the Defendants as Amarjeet witnessed the agreement and EPIC had issued the letter dated 14 October 2011 (signed by Ramli) adressed to 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' requesting that arrangements be made for the obtaining of Domestic Shipping Licences for the dredger, anchor boat and tugboat named in the letter ('KSE vessels') — The KSE vessels had in fact arrived at the site of the works on 24 October 2011.

[9] In para 13 of the amended statement of claim, Baltic claimed that EPIC wanted the works to be performed jointly by Baltic and Kondisi under/in the name of 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV'. This was reflected in EPIC's letter of offer dated 30 October 2011 (signed by Ramli) inviting the JV to undertake the works.

[10] The letter stated that the first payment of 5% of the contract sum was to be paid to the JV within five business days upon the arrival of the first dredger boat at the site of the works. As the contract amount was erased, Baltic did not know the value of the contract being offered. Nonetheless, as the KSE vessels had arrived on 24 October 2011, the payment of 5% of the contract sum was due.

[11] Baltic claimed that instead of paying the JV, EPIC paid Kondisi the 5%. This meant that Baltic was not able to pay AA Dredgers for the KSE vessels. Consequently, AA Dedgers was not able to pay KSE Marine Works Sdn Bhd ('KSE') from whom AA Dredgers sourced the KSE vessels, leading to KSE terminating its contract with AA Dredgers.

[12] EPIC then, according to Baltic, dealt directly with KSE and used the KSE vessels obtained by Baltic from KSE through AA Dredgers for the works. Baltic claimed that EPIC and Kondisi had conspired to take over the works without regard for the inducement and representations made by them to Baltic and in breach of the agreement and contract between Baltic and Kondisi and between EPIC and the JV. They had therefore deprived Baltic of the revenue that it expected to gain from the works.

EPIC'S defence

[13] EPIC's defence was that it did not have privity of contract with Baltic. The only contract it entered into in relation to the works was with Kondisi. That was the contract the terms of which were contained in the letter dated 16 October 2011. Under the terms of that letter/contract, Kondisi was obliged to procure the vessel Sical Portofino. This Kondisi failed to do, thus breaching the contract.

[14] EPIC also claimed that the undated letter and the letter dated 30 October 2011 were issued to Kondisi at Kondisi's request to enable a joint venture to be formed between Kondisi and Baltic to facilitate the procurement of dredgers for the works. In any case, claimed EPIC, the letters had not been formally issued as EPIC's and Kondisi's stamps had not been affixed on each page, and were therefore not binding.

Kondisi's defence

[15] Kondisi in its defence denied appointing Baltic as its subcontractor. The letters dated 10 May 2011 and 02 August 2011, said Kondisi, were not letters of appointment of Baltic as a subcontractor for the works but merely to enable Baltic to procure Sical Portofino.

[16] Indeed, claimed Kondisi, it was only appointed by EPIC on 17 October 2011 when it accepted EPIC's offer for the works.

[17] Kondisi denied knowledge of the letter dated 30 October 2011 and denied forming the JV with Baltic. It claimed that it was Baltic who had been trying to get it to agree to the JV which never materialised.

[18] Kondisi also denied being a party to the contracts/agreements with AA Dredgers and/or KSE.

[19] It was Kondisi's contention that as a result of an ad interim injunction order obtained by Baltic on 24 April 2012, Kondisi and its agents were not able to proceed with the works and EPIC was not able to make progress payments to Kondisi for work already done. This led to other components of the works to be adversely affected and no work could proceed. Kondisi thus counterclaimed for the loss it claimed it suffered as a result of the ad interim order.

HIGH COURT DECISION

[20] After a full hearing, the High Court dismissed Baltic's claim with costs and allowed Kondisi's counterclaim with costs.

[21] The learned trial judge held that there was no contract between EPIC and Baltic, or between Kondisi and Baltic. The letters relied upon by Baltic to show the existence of the contract with Kondisi were, according to the learned trial judge, merely letters of offer that envisaged the execution of a further agreement, which agreement was not produced in court. The learned trial judge also found that no joint venture existed and that Baltic's appointment by Kondisi was conditional upon Baltic's procurement of Sical Portofino for the works.

[22] Baltic appealed against the decision to the Court of Appeal.

AT THE COURT OF APPEAL

[23] The Court of Appeal, after hearing the parties, allowed Baltic's appeal.

[24] The Court of Appeal found, 'on a perusal of the evidence in totality that a contract made partly in writing, partly by conduct and/or performance' subsisted between Baltic and Kondisi and between EPIC and the JV.

[25] The contract between Kondisi and Baltic arose, according to the Court of Appeal, from the letters dated 10 May 2011 and 2 August 2011, the conduct of Kondisi's director, Amarjeet, as well as the performance by Baltic.

[26] The Court of Appeal's finding of the existence of a contract between EPIC and the JV was based on the undated letter issued by EPIC in August 2011 and the letters dated 14 October 2011 and 30 October 2011, respectively, and the conduct of Ramli and the performance by Baltic.

[27] The Court of Appeal also found, alternatively, that the contract between EPIC and the JV superseded the contract between Kondisi and Baltic.

[28] The breach of the contracts (which the Court of Appeal said 'are contracts implied in fact', 'suggested from the facts and circumstances that indicate a mutual intention to contract') came about, according to the Court of Appeal, when neither EPIC nor Kondisi 'made the requisite payments for the dredgers under the contract between AA Dredgers and Baltic'.

[29] The breach of contracts, according to the Court of Appeal, was compounded by 'their' direct dealing with KSE 'thereby preventing Baltic from performing its part of the contracts with EPIC and/or Kondisi Utama to provide a dredger for the dredging sub-works'.

[30] The Court of Appeal found that the declarations sought by Baltic in paras (a), (aa), (c) and (cc) of its amended statement of claim and the order for specific performance sought in para (b) of the amended statement of claim 'cannot be granted as they refer to specific documents as constituting the entire contract between the parties'. However, the Court of Appeal was of the view that prayer (r) of the amended statement of claim 'may be relied upon to grant Baltic a declaration that contracts subsisted as set out above'. The Court of Appeal relied on a statement in the judgment in the case of *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42; [2004] 3 CLJ 679, that 'The Court of Equity may therefore mould the relief that is to be granted on particular facts'.

[31] The Court of Appeal consequently ordered general damages to be

assessed for the breach of contracts as well as as interest as claimed by Baltic in para (p) of the amended statement of claim.

AT THE FEDERAL COURT: LEAVE TO APPEAL

[32] Aggrieved by the decision and orders of the Court of Appeal, EPIC and Kondisi applied for leave to appeal to the Federal Court. Leave to appeal was granted by this court to EPIC and Kondisi on 1 December 2015.

LEAVE QUESTIONS

[33] The questions of law for which leave to appeal was granted by the Federal Court ('leave questions') are as follows:

Kondisi's Appeal (Appeal No 89)

(1) Where a Plaintiff's pleaded case is premised on a contract between a Joint Venture Company and a Defendant, can the Plaintiff who is not a privy to or party to the contract maintain an action against the Defendant without the Joint Venture Company being impleaded as a party and can the Court order damages to be paid to the Plaintiff when the innocent party is the Joint Venture Company?

(2) Where the pleaded case of the Plaintiff is that a contract subsists between party A and a Joint Venture Company comprising of the Plaintiff and Party B and the Court having found that there was such a contract and Party A is in breach of the contract, can the court in law order damages against both Party A and Party B?

(3) Whether for a Court to declare that an implied contract subsists between two parties, the Court must first be satisfied that all the requirements for the formation of a contract, viz, offer and acceptance, consideration, intention to create legal relations, and certainty of terms must be satisfied before the court will imply the existence of a contract?

EPIC'S Appeal (Appeal No 90)

(1) Whether an appellate court, in the absence of a specific and a credible claim pleading a joint venture agreement which is, in any event, wholly devoid of particulars in the statement of claim and which in any event, after hearing witnesses is rejected by the trial Court, may infer that the 1st Respondent (ie the Plaintiff) had indeed intended to bring such a joint venture into existence and proceed to assist the 1st Respondent (Plaintiff) to better its pleadings and if so, to what extent the Appellate court may depart from the original pleadings in granting relief(s) if any.

(2) Whether in law, a state owned and/or appointed entity (ie the 1st Defendant) may be held liable to a third party (the Plaintiff) either by conduct or inference, when that third party is part of an unincorporated

joint venture with another entity (the 2nd Defendant) and which other entity (the 2nd Defendant) had privity of contract with the state entity (the 1st Defendant).

(3) Whether in law, in the total absence of evidence, can the court grant an order and/or relief to an unincorporated joint venture particularly where the claim was not pleaded as a joint venture arrangement and where the evidence shows that a joint venture entity was never created or intended to exist at all, in the circumstances where the reliefs and/or order would be rendered unenforceable and in vain.

AT THE FEDERAL COURT: APPEAL SUBMISSIONS

Submissions by Kondisi

[34] Kondisi submitted that the proposal for the formation of a joint venture company by Baltic and Kondisi did not materialise. Baltic did not seek relief by way of declaration that there was a joint venture between Baltic and Kondisi known as 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV'.

[35] Kondisi contended that the trial judge was correct when his lordship held that the various letters relied upon by Baltic as proof of the existence of a contract between Baltic and Kondisi were invalid because they were not dated. Further, these letters envisaged a further formal agreement to be executed by the parties, which agreement was not produced by Baltic.

[36] Kondisi submitted that the Court of Appeal erred when it held that there was an implied contract between Baltic, EPIC and Kondisi. Kondisi pointed out that in respect of the undated letter (referred to in paras 14–15 of the amended statement of claim):

(a) the contract sum was not stated;

(b) the conditions precedent in items 3.1 and 3.2 were never satisfied by Baltic and/or the JV company;

(c) Baltic and/or the JV company did not prepare a project schedule as required by item 2(vi); and

(d) Baltic and/or the JV company did not signify its acceptance by signing and returning the original copy as required by item 6.

[37] In respect of the letter dated 30 October 2011, it was submitted by Kondisi that:

(a) the contract sum had been blanked out;

(b) the quantum of the first payment under the payment schedule is not stated;

(c) the conditions precedent to the commencement of works under item 3.1 (a), (b), (c) and (d) were not complied with by Baltic and/or the JV company; and

(d) the JV company did not signify its acceptance of the letter of offer by signing and returning the original copy of the letter of offer.

[38] Baltic's pleaded case, according to Kondisi, was that an express contract existed between Kondisi and the JV. Kondisi contended that as parties are bound by their pleaded case it was not open to the court to make a finding of the existence of an implied contract. When a party has failed in law to establish the existence of an express contract, the Court of Appeal cannot make an implied contract for the parties. Hence, the Court of Appeal erred in rejecting the finding of fact by the learned High Court judge that there was no contract between EPIC and the JV.

Submissions by EPIC

[39] EPIC submitted that Baltic failed to plead that a joint venture company was incorporated by Baltic and Kondisi or that a joint venture agreement was concluded between Baltic and Kondisi.

[40] EPIC submitted that Baltic also did not plead that the claim was brought on behalf of and for the purported joint venture company or that all acts of Baltic, inter alia, in sourcing the dredgers, were for the benefit of the purported JV. In fact, Baltic's claim against Kondisi was pursuant to contracts dated 10 May 2011 and 02 August 2011 between Baltic and Kondisi, which fortified the fact that Baltic's claim was not pursuant to the purported joint venture company (which never came into existence) but was indeed Baltic's personal claim.

[41] EPIC contended that the facts as pleaded by Baltic as set out in the amended statement of claim were not the basis for a claim by the unincorporated joint venture company or a claim of contract by implied facts. The evidence adduced at trial also supported the fact that there was no joint venture between Baltic and Kondisi.

[42] EPIC submitted that in the absence of pleadings, evidence if any, produced by the parties, cannot be considered by the court and no party should be permitted to travel beyond its pleadings. Hence, it was contended by EPIC that the Court of Appeal cannot decide a suit on matters which were not pleaded.

A **[43]** EPIC claimed that as the contract for the works was awarded to Kondisi, EPIC had merely advised parties to work together with Kondisi. The work done by Baltic was in relation to the contract dated 2 August 2011 between Baltic and Kondisi. EPIC confirmed that there was no contract between Baltic and EPIC. Hence, there was no privity of contract between
B Baltic and EPIC.

Baltic's submissions

[44] Baltic submitted that EPIC and Kondisi had never accepted that the
C unincorporated JV was a separate legal entity. In fact, it had always been the position of EPIC and Kondisi that the JV was never created or intended to exist at all.

[45] Furthermore, it had always been Baltic's case that EPIC and Kondisi
D had worked together to cheat Baltic. As such, Baltic by itself could never commence an action by pleading the JV as a party to this action.

[46] Baltic contended that both EPIC and Kondisi had colluded with each
E other and not made any payment either to the JV or to Baltic and had instead wrongfully and with malice made the payment to Kondisi alone. It was clear from the evidence produced by EPIC during the assessment trial that EPIC had made payment of RM36,176,913.83 to Kondisi. As such, EPIC and Kondisi could not now evade the payment of damages suffered by Baltic.

F **[47]** Hence, Baltic submitted that the Court of Appeal was correct when it held that both EPIC and Kondisi were in breach of their contract with Baltic and ordered that damages suffered by Baltic be assessed.

G **[48]** Baltic submitted that although both EPIC and Kondisi had denied any knowledge of any dealings with Baltic, nevertheless all evidence and documents showed that both EPIC and Kondisi had dealings with Baltic and had full knowledge of the matter.

H **[49]** Baltic further submitted that Kondisi was bound by the appointment letters dated 10 May 2011 and 02 August 2011 and should be estopped from disputing them. Actions by both EPIC and Kondisi had caused Baltic to procure the dredgers. The same dredgers procured by Baltic were used for the works by Kondisi.

I **[50]** EPIC had proceeded to issue the undated letter of appointment and letters dated 14 October 2011 and 30 October 2011 to the JV. Hence, both EPIC and Kondisi should be made responsible when Baltic was sidelined and not allowed to proceed with the works.

[51] Baltic submitted that it was correctly held by the Court of Appeal that the contract between EPIC and the JV superseded the subcontract between Baltic and Kondisi.

[52] Baltic further submitted that the Court of Appeal did not 'better' Baltic's pleadings since the joint venture was already pleaded. As such, the question as to what extent the Court of Appeal may depart from the original pleadings did not arise.

[53] Baltic contended that EPIC being the owner of the works had testified through Ramli that Kondisi had appointed Baltic to do the works. This appointment was evidenced by the work that had been undertaken by Baltic and confirmed by the e-mails to both EPIC and Kondisi.

[54] Baltic submitted that it was clear that the JV was formed on the instruction and with the knowledge of EPIC. It was also clear from the fresh evidence which was only revealed by EPIC during the trial for assessment of damages at the High Court that EPIC had recognised the said JV and had also made a large payment in the range of RM36m to Kondisi based on instructions from the JV.

[55] Baltic contended that EPIC, having made that payment to Kondisi, cannot now deny that there was privity of contract between EPIC and the JV. Baltic submitted that EPIC must also pay Baltic's portion under the JV.

FRESH EVIDENCE: LETTER DATED 4 AUGUST 2011

[56] On 6 September 2017 when hearing of this appeal commenced, we allowed the application by Baltic to adduce fresh evidence in the form of a letter dated 4 August 2011 signed by one Muhammad bin Hamzah who described himself as the General Manager and who wrote for 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV'.

OUR ANALYSIS

[57] The reliefs prayed for by Baltic are as follows:

(a) satu perintah perisytiharan bahawa kontrak bertarikh 30.10.2011 antara Defendan Pertama dan Kondisi Utama Sdn. Bhd. Baltic Agencies Pte Ltd JV adalah sah, berkuat kuasa dan mengikat Defendan·defendan;

(aa) satu perintah perisytiharan bahawa kontrak bertarikh 10.5.2011 dan 2.8.2011 antara Defendan Kedua dan Baltic Agencies Pte Ltd adalah sah, berkuat kuasa dan mengikat Defendan-defendan;

(b) satu perintah perlaksanaan spesifik terhadap Defendan-defendan mengarahkan Defendan-Defendan untuk mematuhi kontrak yang telah dipersetujui dan Plaintif dibenarkan untuk meneruskan dengan kerja-kerja projek tersebut samada di bawah syarikat Plaintif dan atau JV;

(c) secara alternatifnya satu perintah perisytiharan bahawa Defendan Pertama telah memungkiri kontrak bertarikh 30.10.2011 terse but kerana telah gagal, ingkar dan cuai dalam melaksanakan dan mematuhi terma-terma dan syarat-syarat kontrak tersebut;

(cc) secara alternatifnya satu perintah perisytiharan bahawa Defendan Kedua telah memungkiri kontrak bertarikh 10.5.2011 dan 2.8.2011 tersebut kerana telah gagal, ingkar dan cuai dalam melaksanakan dan mematuhi terma-terma dan syarat-syarat kontrak tersebut:

(d) secara lanjutan dan/atau alternatif, gantirugi khas berjumlah USD21.45 juta daripada Defendan Pertama dan/atau Defendan Kedua untuk menggantikan perlaksanaan spesifik kontrak terhadap projek tersebut;

(e) secara lanjutan dan/atau alternative gantirugi khas berjumlah US 15 juta daripada Defendan Pertama dan/atau Defendan Kedua akibat perlanggaran kontrak ~~oleh Defendan Pertama~~;

(f) secara lanjutan dan/atau alternatifnya, gantirugi am untuk ditaksirkan oleh Mahkamah yang Mulia ini dan dibayar oleh Defendan-defendan kepada Plaintif alas kemungkinan dan/atau penyangkalan kontrak oleh Defendan Pertama dan Defendan Kedua;

(g) perintah injuksi interim menurut Aluran 29 Kaedah 1(1) Kaedah kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja pekerja ataupun agen-agennya dan/atau mana-mana daripada mereka daripada meneruskan, menyempurnakan dan melengkapkan segala bentuk kerja yang melibatkan projek yang dikenali sebagai 'dredging, reclamation and marine infrastructure development works at Pulau Kuching, Kemaman, Terengganu' (kemudiannya dirujuk sebagai projek tersebut) atau sebarang kerja yang akan memberikan kesan kepada Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(h) perintah injunksi tetap menurut Aturan 29 Kaedah 1 (1) Kaedah kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja pekerja ataupun agen-agennya dalam apa jua carapun daripada melantik sebarang kontraktor lain dan/atau pihak ketiga dan/atau KSE Marine Works Pte Ltd (200400697K) untuk menggantikan Plaintif sebagai kontraktor untuk projek tersebut dan atau untuk meneruskan dengan sebarang kerja berkenaan projek tersebut yang

akan memberikan kesan kepada Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(i) Perintah injunksi tetap menurut Aturan 29 Kaedah 1(1) Kaedah kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja pekerja ataupun agen-agennya dalam apa jua carapun daripada berurusan, membuat menandatangani dan menyempurnakan sebarang dokumen dengan mana-mana pihak berkenaan dengan projek tersebut yang akan membawa apa jua kesan terhadap kepentingan Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(j) perintah injunksi interim menurut Aturan 29 Kaedah 1(1) Kaedah kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada mengeluarkan atau melepaskan sebarang pembayaran atau wang dalam apa jua bentuk dan cara sekali pun kepada Defendan Kedua dan/atau KSE Marine Works Pte Ltd (200400697K) atau mana-mana orang berkenaan dengan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(k) perintah injunksi interim menurut Aturan 29 Kaedah 1(1) Kaedah kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada mengeluarkan atau melepaskan sebarang pembayaran atau wang dalam apa jua bentuk dan cara sekali pun kepada KSE Marine Works Pte Ltd (200400697K) atau mana-mana pihak ketiga dan atau sesiapa berkenaan dengan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(l) perintah injunksi menurut Aturan 29 Kaedah 1(1) Kaedah-kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja pekerja ataupun agen-agennya dan/atau mana-mana dari mereka daripada mengeluarkan sebarang notis ke alas Plaintif berkenaan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(m) perintah bahawa Defendan Pertama dan/atau Defendan Kedua diarahkan untuk membekalkan dan mendedahkan 'jumlah penuh kontrak' yang telah sepatutnya disiratkan dalam sural perlantikan

bertarikh 30.10.2011 daripada Defendan Pertama dalam tempoh empatbelas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(n) perintah bahawa Defendan Pertama diarahkan untuk membekalkan dan mendedahkan segala butir-butir akaun-akaun yang menunjukkan pelepasan pembayaran kepada Defendan Kedua dan/atau mana-mana pihak berkenaan projek tersebut dalam tempoh empat belas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(o) perintah bahawa Defendan Kedua diarahkan unluk membekalkan dan mendedahkan segala butir-butir akaun-akaun yang menunjukkan pelepasan pembayaran kepada mana-mana pihak berkenaan projek tersebut dalam tempoh empat belas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(p) Faedah ke alas gantirugi-gantirugi am yang dirujuk dalam prayer prayer (d) dan (e) di alas pada kadar 8% setahun dari 1.11.2011 sehingga tarikh penyelesaian penuh;

(q) Kos pada dasar indemniti; dan

(r) Apa-apa relif, perintah, arahan, akaun dan siasalan yang Mahkamah yang Mulia ini fikir patut dan wajar diberikan.

[58] The reliefs claimed by Baltic against EPIC and Kondisi can be summarised as follows:

(a) a declaration that the contract dated 30 October 2011 was a valid and binding contract between EPIC and the JV;

(b) a declaration that the contract dated 10 May 2011 and 2 August 2011 was a valid and binding contract between Baltic and Kondisi;

(c) an order for specific performance of the contracts, or alternatively declarations that EPIC and Kondisi had breached their contracts with the JV and Baltic, respectively;

(d) special damages of USD21.45m as an alternative to specific performance or USD15m for breach of contract; or general damages to be assessed;

(e) injunctions to injunct EPIC and Kondisi and/or their directors and/or servants and/or agents from proceeding to execute the works; or from appointing any other contractors to continue with or complete the works; or from making any payment to any party for the works or from executing any documents that would prejudice Baltic pending the outcome of the suit;

(f) an order that EPIC and/or Kondisi provide and disclose the contract price that should have been expressed in the contract dated 30 October 2011; and

(g) an order that EPIC provide and disclose detailed accounts with regard to the payments it made to Kondisi or any other party for the works.

[59] The injunctions sought were apparently no longer an issue by the time the trial ended in the High Court.

[60] Thus, what were left were declarations as to the validity of the contract that Baltic claimed it had entered into with Kondisi pursuant to the letters dated 10 May 2011 and 2 August 2011 and the contract Baltic claimed EPIC had entered into with the JV based on the undated letter and the letter dated 30 October 2011; as well as the specific performance of those contracts or, alternatively, damages for breach of those contracts.

[61] Before dealing with the issue of implied contract, we will address the issue of the letters dated 30 October 2011, 10 May 2011 and 2 August 2011.

LETTER DATED 30 OCTOBER 2011

[62] In para 13 of the amended statement of claim Baltic claimed the existence of EPIC's inducement and representations for the works to be undertaken by both Baltic and Kondisi jointly under the name of 'Usahasama Kondisi Utama Sdn Bhd. Baltic Agencies Pte Ltd JV'. In other words, the JV that Baltic said had been offered the contract in the undated letter and the letter dated 30 October 2011 was an unincorporated joint venture.

[63] A perusal of the letter of offer dated 30 October 2011 signed by Ramli and addressed to the JV at Kondisi's address, appears to have had the contract sum erased. The amount of first payment of the contract sum had also been erased.

[64] The letter dated 30 October 2011 states:

> 6. This Letter of Offer is sent to you in duplicate. Kindly signify your acceptance by signing at the space provided below and return the original copy duly signed and witnessed to the undersigned within five (5) days from the date hereof, and retain the duplicate copy for your record.

[65] Paragraph 2 of the letter states that 'With the acceptance of this Letter of Offer, you are hereby informed that a legal and binding contract exists between you and Eastern Pacific Industrial Corporation Berhad' based on the terms set out in the letter.

[66] There was no dispute that this letter was not signed and the original was not returned to Ramli. PW1 in his evidence admitted that it was not signed.

[67] In the absence of the acceptance of the offer in the manner stipulated in para 6 of the letter, there cannot be in existence a contract by virtue of that letter of offer dated 30 October 2011.

LETTERS DATED 10 MAY 2011 AND 2 AUGUST 2011

[68] In relation to the contract claimed by Baltic to have come into existence between itself and Kondisi, we note that subsequent to the letter dated 10 May 2011 from Kondisi appointing Baltic as its subcontractor, oral evidence shows that there was a meeting on 30 July 2011 at EPIC's office and this was followed by the letter dated 2 August 2011 again appointing Baltic as Kondisi's subcontractor but this time with specific mention of the dredging vessel Sical Portofino. In our view, the letter dated 2 August 2011 had clearly superseded the letter dated 10 May 2011.

[69] The appointment by the letter dated 2 August 2011 was accepted by Baltic as signified by the signature of its Managing Director, Captain Shaukath Ali ('Shaukath') and Baltic's stamp. The letter was not disputed by Kondisi. What was disputed by Kondisi was the performance of the contract formed pursuant to the acceptance of the letter.

[70] Kondisi claimed that Baltic had breached the 2 August 2011 contract when it failed to procure Sical Portofino as required under the contract.

[71] We note that the Court of Appeal declined to grant the reliefs prayed for by Baltic in paras 37(a), (aa), (b), (c) and (cc) of the amended statement of claim 'as they refer to specific documents as constituting the entire contract between the parties'.

[72] The Court of Appeal, however, decided to grant a declaration pursuant to para 37(r) of the amended statement of claim. The Court of Appeal found that:

(a) 'a contract made partly in writing, partly by conduct and/or pertormance subsists between Baltic/appellant and Kondisi Utama 2nd respondent, as well as between EPIC/1st respondent and the unincorporated JV known as 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV';

(b) the contract between Baltic and Kondisi 'arises from the letters of 10 May 2011, 2 August 2011, and the conduct of its director, Amarjeet

Singh as well as the fact of pertormance by Baltic' and that their relationship was that of 'contractor and sub-contractor respectively'; and

(c) the contract between EPIC and the JV 'arises from the undated letter issued by EPIC in August 2011, the letter of 14 October 2011 and 30 October 2011 together with the conduct of its Chief Executive Officer Ramli Shahul Hameed and the fact of pertormance by Baltic'.

[73] As mentioned earlier, the Court of Appeal also found in the alternative that the contract between EPIC and the JV superseded the subcontract between Baltic and Kondisi.

[74] The Court of Appeal held that 'these contracts are contracts implied in fact. A contract implied in fact is not expressed by the parties, but rather suggested from the facts and circumstances that indicate a mutual intention to contract. Circumstances exist that, according to the ordinary course of dealing and common understanding, demonstrate such an intent that is sufficient to support a finding of implied contract. We found this to be the case based on the evidence before the court'. The Court of Appeal quoted the following passage from *Chitty's on Contract:*

> Agreement is not a mental state, but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what in in their minds but by what they have said or written ot done.

[75] Was the Court of Appeal correct in making the finding that implied contracts subsisted between the parties? Unfortunately in their broad grounds the Court of Appeal did not explain the reasons for their finding. Therefore, we need to examine the relevant oral and documentary evidence, in particular the conduct of the parties, in order to answer that question.

EPIC'S CONTRACT WITH KONDISI

[76] EPIC's and Kondisi's position was that the contract for the works only came into being on 17 October 2011 when Kondisi accepted EPIC's letter of offer dated 16 October 2011, and that there was no contract before that. Impliedly therefore, Kondisi was saying that it could not have entered into any contract with Baltic.

[77] Kondisi in its defence dismissed the letter dated 2 August 2011 as merely a letter to enable Baltic to 'berurusan dengan Kapal Korek bernama SIGAL PORTOFINO' and 'untuk membolehkan Plaintif menetapkan kapal pengorekan atau dredger yang dikenali sebagai SIGAL PORTOFINO yang mana walau apa pun juga tidak berlaku'.

[78] To determine whether Kondisi's own contract for the works came into existence only upon its acceptance of EPIC's letter of offer dated 16 October 2011, we need to begin with the award to EPIC of the contract for the works by the state government.

[79] Ramli went to great lengths to avoid informing the court of the date EPIC entered into the main contract with the state government for the works, repeatedly claiming that he could not remember. It was quite improbable that Ramli could not remember the date a multi-million ringgit contract was awarded to the company he was the CEO of. He tried to give the impression that the contract was only awarded to EPIC after August 2011. After examining the evidence, we do not agree that the contract was only awarded to EPIC after August 2011.

[80] It is quite clear to us that as early as March 2011 EPIC had already been awarded the contract by the state government. It was for that reason that EPIC had begun to find contractor(s) to perform the works for it. The evidence by Ramli and PW2 (who was holding the post of Director Commercial for Baltic) was that a letter of intent was issued by EPIC to Baltic for the works. That letter was not in evidence as it was not allowed by the court to be admitted. In his witness statement PW2 gave the following evidence:

> Question 4: Can you explain how you came to know about this dredging project?
>
> Answer: Captain Khaja Shaukath Ali and I were briefed about this project through Encik Omar & his team of friends whom we met in March 2011. I was informed that they were sourcing for dredgers for the said project at Kemaman. They had approached us based on the Plaintiff's experience in the shipping industry.
>
> Based on the requirements that they briefed us, the Plaintiff had identified an Indian dredger, SICAL Portofino for the project and had presented the same.
>
> Question 5: What happen thereafter?
>
> Answer: The Plaintiff received a letter of intent from the main employer, the First Defendant who had informed that they were given the approval from Terengganu State Government to do the dredging works and the First Defendant was inviting the Plaintiff to participate in the dredging activities and also have shown interest to visit thedredger.

[81] We note that when PW2 was cross-examined by EPIC's counsel the fact that a letter of intent was sent to Baltic in March 2011 did not appear to be disputed by EPIC:

> Ms. Norliza: What letter are you talking about?
>
> PW-2: Letter from EPIC to Baltic Agencies inviting us to participate in dredging activities at Pulau Kuching, Kemaman
>
> Ms. Norliza: Now that letter was disallowed by this Court. you saw this letter personally when it was sent?

PW-2: Yes, it is there with us. **A**

Ms. Norliza: were it arrived at Baltic

PW-2: It was with Capt. Shaukath Ali. Yes I see the letter.

Ms. Norliza: Did you see priOr to this action in Court today?

PW-2: Yes **B**

...

Ms. Norliza: and you will know then that the headings say Letter of Intent. Do you agree?

PW-2: Yes. **C**

Ms. Norliza: You gather information based on this letter of intent?

PW-2: Correct.

Ms. Norliza: And then your contract with Kondisi came into being only in May?

PW-2: Yes. **D**

Ms. Norliza: So you did all that works from March to May.

Yes?

PW-2: Even after that.

Ms. Norliza: I know. I'm only talking about March to May. So if there is no contract, all that costs would have been yours, Baltic **E**

PW-2: Yes

[82] In the letter dated 10 May 2011 Kondisi represented that EPIC 'has awarded the above-mentioned works to us'. The letter gave specific information of the scope of the works said to have been awarded to Kondisi: **F**

1. Dredging works to a depth of 5 m below Chart Datum and dispose the dredged material to onshore reclamation area or to an area as specified by us at rate of RM10.70 per m3 for a quantity of 4,887,000 m3. **G**
2. Dredging works to a depth of 5m below Chart Datum and dispose the dredged material to onshore reclamation area or to an area as specified by us at rate of RM10.70 per m3 for a quantity of 693,000 m3.

The total sub-contract sum shall be RM59,706,000.00. **H**

[83] To our minds it is inconceivable that Kondisi could offer a contract with those details and that contract sum without having already been awarded a contract for the works by EPIC with those details and without knowing the value of its own contract with EPIC. **I**

[84] We also have the evidence of the trip to India in April 2011 facilitated by Baltic to enable Ramli to view Sical Portofino, with Kondisi's representatives joining him.

[85] Quite obviously, EPIC had, by the time of the trip to India, been awarded the main contract for the works by the state government and certainly by 10 May 2011 had already awarded Kondisi a contract for the works.

[86] In Ramli's witness statement, he said, in reply to the question whether to his knowledge there was any contract between Baltic and Kondisi:

> Tiada kontrak formal tetapi ini jelas terlihat melalui surat-surat Defendan Kedua dan Plaintif bertarikh 10.5.2011 dan 2.8.2011.

[87] If Kondisi did not have the contract for the works until the letter of offer dated 16 October 2011, how could there be a contract, informal though it may be, between Kondisi and Baltic in May–August 2011 for the very same works?

EPIC'S IMPLIED CONTRACT WITH THE JV

[88] There is no doubt in our minds that it was Baltic that was EPIC's initial choice as contractor, as was clear from PW2's evidence reproduced above. The snag was, as can be seen from Ramli's oral evidence, that as a government-linked company of the state government EPIC was obliged to engage a Malaysian company. That was how Kondisi came into the picture despite Kondisi's then clear lack of capital or experience.

[89] Oral and documentary evidence showed that Kondisi was a RM2 company at the time it was 'chosen' by Ramli/EPIC to be the main contactor for the works. Amarjeet admitted that it was a 'shelf' company. Amarjeet also admitted that Kondisi had absolutely no experience in dredging works or even shipping.

[90] Ramli was not able to give any reasonable answer as to why Kondisi was chosen for the works, a multi-million ringgit project. It became clear, upon sifting the various contradictory and evasive answers he gave during cross-examination, that Kondisi was chosen because it was a Malaysian company and because of the low price.

[91] It is quite obvious from Ramli's oral evidence during cross examination that EPIC understood Kondisi's total lack of expertise and expected Kondisi to work with someone else who had dredging expertise. We reproduce below verbatim the relevant part of that evidence:

> S74: In simple terms, dredging works. Setuju right?
>
> J: Ya.
>
> S75: So before a contractor an be appointed as contractor, it should have dredging experience. Do you agree?
>
> J: No. As long as they have somebody they can prove to us the work can be done.

S75: In other words, Epic doesn't care so that the projek is awarded to somebody and to sub-contract to somebody else?

J: Bukan macam itu.

S76: Then what is it are you trying to say?

J: Kita mesti melantik Malaysian company tapi dia mesti convince kita dia ada partner yang ada experience untuk buat kerja itu.

S77: Dalam kes ini, in other words, Kondisi Utama was appointed as a sub-contractor because Kondisi Utama had a partner that can do dredging works. Is that correct?

J: Yes.

S78: Now this partner that supposed to do the dredging work together with Kondisi Utama is Baltic Agencies because you had been dealing with them all the while. Do you agree?

J: Not only Baltic. Ada company juga Kondisi bawa.

S79: But throughout until the day the thing came up to court it has been Baltic Agencies and Captain Shaukath Ali. Do you agree?

A: *[no answer recorded]*

[92] The e-mails tendered in evidence and the oral evidence of Shaukath, PW2, Ramli and Amarjeet clearly show that it was Baltic who made efforts at its own expense to obtain Sical Portofino. It is also very clear that Sical Portofino was the final choice of Ramli who went to India to view the vessel.

[93] EPIC, through Ramli, had clearly been involved in the choice of dredgers to be obtained for the works and he had clearly been dealing with Baltic, with the involvement of Kondisi. Why would he do that if EPIC's contract was with Kondisi alone?

[94] Despite Ramli's claims that he never read the emails sent by Baltic, particularly from Shaukath (which we do not think is probable given the value of the contract and the importance of the works to EPIC as admitted by Ramli), it is quite clear that Ramli was being constantly made aware directly by Baltic of the developments in Baltic's efforts to procure dredgers for the works.

[95] Both Ramli and Amarjeet denied that they had agreed to alternative dredgers being sourced in place of Sical Portofino. Both of them claimed that Baltic had breached its contract with Kondisi when Sical Portofino could not be obtained. But Baltic's evidence was that EPIC and Kondisi had been both kept abreast of the developments in its attempt to get Sical Portofino. We do not think that Baltic was not being truthful despite Ramli's and Amarjeet's denial of having been so kept informed, because there is, in particular, the

matter of the agreement signed between AA Dredgers and Baltic dated 7 October 2011 witnessed by Amarjeet.

[96] Under the 7 October 2011 agreement, AA Dredgers agreed to provide and operate three dredgers for the works, the first dredger to arrive at the site of the works after 30 October 2011. This led to AA Dredgers entering into an agreement with KSE Marine Works Pte Ltd on 13 October 2011 for the charter of KSE's vessels.

[97] Then came the letter dated 14 October 2011 from EPIC to the JV in relation to the obtaining of domestic shipping licences for the KSE vessels which were specifically named in the letter, and subsequently the letter of offer to the JV dated 30 October 2011.

[98] In his witness statement Ramli claimed that the letters dated 14 October 2011 and 30 October 2011 were mere drafts. But his reasons for the drafts being issued were quite interesting. He said:

> Saya telah mengeluarkan deraf surat-surat ini untuk membolehkan Defendan Kedua dan Plaintif mendapatkan vessel/dredger lain untuk projek tersebut setelah Plaintiff gagal mendapatkan SIGAL PORTOFINO pada 15 October 2011. Plaintif telah meminta surat-surat ini dikeluarkan agar untuk membolehkan Plaintif memasuki kontrak dengan pihak baru untuk mendapatkan dredger baru.

[99] Ramli was singing a different tune during cross-examination. During cross-examination he said that the letter dated 14 October 2011 was issued to enable the vessels which were already in the open sea to get into safe harbour because of the monsoon season. This raised a few questions in our minds:

(a) if the vessels were brought in by Kondisi OR Baltic, why was it necessary for EPIC to ask the JV to obtain the domestic shipping licences?

(b) surely the chief executive officer of a public-listed company does not, as claimed by Ramli, simply sign a letter at the request of a party when that party has no relationship with the company?

(c) the evidence shows that the vessels only reached the site on 24 October 2011, but why was the letter dated some ten days earlier if it was indeed issued to enable the vessels which were already in the open sea, according to Ramli, to come into safe harbour?

[100] As for the letter dated 30 October 2011, even if it was a draft, why should Ramli issue it when on 16 October 2011 EPIC had issued a letter of offer for the works to Kondisi and on 17 October 2011 Kondisi had accepted the offer?

[101] It is our considered view that the totality of the evidence before the court clearly shows that while neither EPIC nor Kondisi was a party to the 7 October 2011 agreement between Baltic and AA Dredgers or the agreement dated 13 October 2011 between AA Dredgers and KSE (as was repeatedly stressed upon during the cross-examination of Baltic's witnesses and in submissions before us) EPIC and Kondisi were all along not only aware of Baltic's efforts to procure dredgers for the works in place of Sical Portofino, but had also agreed to such replacements.

[102] The manner in which the parties conducted themselves gives rise, to our minds, to only one conclusion: that EPIC was dealing with Kondisi and Baltic as if Kondisi and Baltic were in a joint venture for the works.

[103] We acknowledge that the JV is not a party to this case. We also acknowledge that the reliefs claimed by Baltic against EPIC are principally for declarations that there was a valid contract dated 30 October 2011 between EPIC and Baltic.

[104] However, as against Kondisi, the JV is not an issue. Baltic claimed reliefs against Kondisi in relation to the letters dated 10 May 2011 and 2 August 2011.

[105] The question we need to answer, as we have stated earlier, is whether the Court of Appeal was correct in its findings that an implied contract had been made partly in writing (based on the letters mentioned above) and partly by conduct and/or performance between Baltic and Kondisi and between EPIC and the unincorporated JV.

[106] The letter dated 14 October 2011 addressed to the JV was clearly not a draft. As we have stated above, Ramli's evidence during cross-examination negates his evidence in his witness statement that it was a draft. That letter was definitely issued to the JV. But how would the JV, which was obviously unincorporated, act? A number of questions were posed to the various witnesses by EPIC's and Kondisi's counsel to show that the JV did not exist. Among the questions posed to PW2 was how could a cheque be issued to an entity which did not exist. PW2's answer was that that was the reason an account had to be opened. He admitted that there was no account opened in the JV's name.

[107] We note from the letter dated 14 October 2011 that the JV was using Kondisi's address as its address. The JV also had a solution to the account problem.

[108] As mentioned earlier in this judgment, we admitted a letter dated 4

August 2011. That letter was written on the letterhead of 'Kondisi Utama Sdn Bhd. Baltic Agencies Pte Ltd JV', addressed to EPIC, and signed by one Muhammad bin Hamzah as General Manager. The letter instructed EPIC to issue all progress payments for the works to Kondisi and into Kondisi's Maybank account.

[109] If there was no JV in existence, how could a letter be issued on the JV's letterhead to EPIC instructing EPIC how and to whom progress payments were to be paid?

[110] We have also closely examined the letter dated 2 August 2011. The contents of that letter show that, probably pursuant to the meeting held on 30 July 2011 at EPIC's office, the parties had in all likelihood agreed that the works would be undertaken by Baltic and Kondisi jointly. Hence the JV.

[111] The first paragraph of the 2 August 2011 letter states that Kondisi was 'pleased to appoint' Baltic 'to handle the dredging project'. This is unlike the letter dated 10 May 2011 by which Kondisi appointed Baltic as its 'sub-contractor' for the works.

[112] The letter dated 2 August 2011, unlike the one dated 10 May 2011, does not state the period of contract or the contract sum. Instead, Kondisi was to pay Baltic certain amounts for certain specific heads. For example, Kondisi would pay Baltic in advance for the costs for applying for the domestic shipping licence for Sical Portofino, and would pay USD5,000 monthly to Baltic throughout the project period towards travelling and accommodation for 'the team'.

[113] The 2 August 2011 letter shows that the obligations involved in executing the works would be shared by Kondisi and Baltic. The following are examples of what had to be performed by Kondisi:

(a) Kondisi would take care of shore handling, levelling, equipments, rivertments, bunds to dump the dredged materials of 6m cubic metres;

(b) Fuel Consumption: The operational fuel consumption will be around 21 MT/24 hours of operation (max). Fuel/Bunkers will be on Charterer's (Kondisi) account. Baltic can assist Kondisi in sourcing fuel of 1000 Metric tons every 45 days at a competititve rate from Singapore;

(c) Fresh Water: will be on charterer's (Kondisi's) account. Baltic will assist sourcing.

(d) Kondisi to obtain work permits for the foreign crew on Kondisi account and Baltic will assist in the process.

[114] It is also interesting to note that if Baltic was to act as an independent subcontractor for the works, there would have been no necessity to provide in the letter dated 2 August 2011 matters such as the following:

(a) Normal Operation hours: will be around 16 Hours depending upon the weather conditions, swell and other operational conditions prevalent at the site;

(b) Monitoring of operations — Baltic representative will be on board the dredger during the duration of the project to monitor the operation and will give daily status report to us, which will be shared Kondisi/EPIC;

(c) Booster pumps Baltic to revert on installation/requirement of booster pumps to increase pumping rate.

[115] In our view, the letter dated 2 August 2011 supports our finding that it was always the intention of the parties that Kondisi and Baltic would work together to perform the works. This was before the actual arrival of the first dredger at the site.

[116] AA Dredgers issued an invoice dated 12 October 2011 (five days after the agreement it entered into with Baltic for the KSE vessels) addressed to Baltic AND Kondisi, seeking the payment of USD200,000 to be remitted by 13 October 2011 and for USD1,945,000 to be paid within three days of the arrival of the first dredger, KSE Hitachi. Kondisi paid the sum of USD100,000 on 18 October 2011.

[117] Amarjeet admitted payment but denied that payment was made pursuant to the invoice. Amarjeet claimed that the amount was paid to Baltic at Baltic's request 'to enable them to go and source dredgers from Korea'.

[118] We find it quite strange for Kondisi to pay Baltic an advance of USD100,000 to merely source dredgers from Korea in October 2011 when Kondisi had by then claimed that Baltic had breached its contract of 2 August 2011 to bring in Sical Portofino and that it had nothing to do with Baltic after that. Why should USD100,000 (half of the invoiced amount) be paid for the purpose of sourcing dredgers from Korea in those circumstances? We also note that no amount was paid to Baltic when it made the arrangements to go to India and when it made all the attempts to obtain Sical Portofino.

[119] The only reasonable conclusion that we can make is that the amount of USD100,000 was indeed paid by Kondisi on 18 October 2011 (one day after it purportedly accepted the letter of offer for the works issued by EPIC) in payment of its share of the amount in AA Dredger's invoice. This supports the existence of the JV and the contract between EPIC and the JV.

A BREACH

[120] We note that while the agreement dated 7 November 2011 promised that the first dredger would arrive on site after 30 October 2011, it had actually arrived on 24 October 2011. By that time the letter of offer dated 16 October 2011 had already been issued to Kondisi by EPIC and accepted by Kondisi on 17 October 2011.

[121] We hesitate to agree with Baltic's contention that the letter dated 16 October 2011 was backdated, but several questions do come to mind which we find rather disquieting:

(a) why the need for a letter of offer dated 16 October 2011 when, as we have stated above, it was clear that there was obviously already a contract in existence between EPIC and Kondisi by 10 May 2011?

(b) why issue a letter of offer to Kondisi merely two days after issuing the letter to the JV with regard to the domestic shipping licences? and

(c) even if the letter dated 30 October 2011 was a draft, why was it even prepared if a letter of offer was indeed issued on 16 October 2011?

[122] All this lend credence to Baltic's claim that EPIC and Kondisi had deliberately sidelined Baltic and deprived it of the gains it would have received had EPIC proceeded with the contract with the JV.

F UNPLEADED CLAIMS

[123] We deal now with issue of Baltic's claims not being pleaded in its amended statement of claim.

[124] We have carefully examined Baltic's amended statement of claim. There can be no doubt that Baltic's complaint is essentially that both EPIC and Kondisi had caused Baltic to believe that it was being engaged to perform the works and had caused Baltic to take steps and to spend time and to incur expenses in the attempt to obtain Sical Portofino, and when that was unsuccessful to obtain a replacement dredger and other vessels. When Baltic succeeded in obtaining the necessary vessels, EPIC and Kondisi had sidelined Baltic and shut it out completely from the works. The specific pleaded reliefs notwithstanding, in our view neither EPIC nor Kondisi was under any misapprehension that that was the complaint against them.

[125] This court in the case of *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir*

Perak) and other appeals [2015] 1 MLJ 773; [2015] 1 CLJ 719 held that evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise, especially if the evidence was given without any objection by the other party. The court referred to the judgment of the Supreme Court in the case of *Superintendent Of Lands And Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567. In that case, Peh Swee Chin SCJ, delivering the judgment of the Supreme Court said, at p 190 (MLJ); p 572 (CLJ):

> As was stated by the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 (FC) at p 278:
>
> > Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.
>
> There is however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.
>
> The exception is when such evidence represents a radical departure from the pleading, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v Lau Piang Ngong* and *John Stein & Co Ltd v O'Hanlon* [1965] AC 890.

[126] As we have shown above, EPIC and Kondisi were certainly not taken by surprise by and did not object to the evidence given by witnesses for Baltic. Evidence was led during cross-examination of their own witnesses which supported Baltic's position.

[127] We are therefore of the view that what Baltic lacked in pleading was more than made up for by the evidence before the High Court.

DECISION

[128] Based on our analysis above, we are unanimous in our view that a contract had come into existence between EPIC and the informal joint venture partnership of Kondisi and Baltic. That joint venture clearly existed and EPIC and Kondisi had clearly admitted its existence by the actions taken by Ramli and Amarjeet.

[129] We also find that the evidence shows that EPIC had breached that contract by offering Kondisi the contract by the letter dated 16 October 2011 and Kondisi had breached its joint venture agreement with Baltic by accepting that offer on 17 October 2011 and subsequently choosing to utilise the KSE vessels procured by Baltic and keeping Baltic out of the works.

[130] The Court of Appeal, in our view, made the correct decision in allowing Baltic's claim and ordering damages to be assessed.

[131] We therefore dismiss these appeals with costs.

[132] In the circumstances of this case, the outcome of which is dependent purely on the finding of facts, we do not find any necessity to answer any of the leave questions.

[133] Finally, we wish to state that this judgment is delivered pursuant to s 78 of the Courts of Judicature Act 1964 as our brothers, Zulkefli Ahmad Makinuddin and Prasad Sandosham Abraham, have retired. However, our brother Zulkefli Ahmad Makinuddin had read this judgment in draft and expressed his agreement to it prior to his retirement.

Appeals dismissed with costs.

Reported by Ashok Kumar